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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROBERTO MONTOYA,

Plaintiff and Respondent,

v.

KIRAN SHAH,

Defendant and Appellant.

D054210

(Super. Ct. No. 37-2007-00067135-
CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County,
Judith F. Hayes, Judge. Affirmed in part and reversed in part.

Kiran Shah appeals from a judgment in favor of Roberto Montoya on Montoya's claims against him for breach of contract and fraudulent misrepresentation. He contends that substantial evidence does not support the trial court's findings on Montoya's claims, or the compensatory and punitive damages awards. He also claims the trial court erred in rejecting his defense of accord and satisfaction. We conclude

that substantial evidence does not support the punitive damages award and reverse that part of the judgment. In all other respects, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In accordance with the applicable standard of review (part I.A., *post*), we shall recite the facts as established by the record viewed in the light most favorable to the judgment, giving Montoya the benefit of every reasonable inference and resolving any conflicts in the evidence in support of the judgment.

In June 2004, Shah owned five Econo Lube 'N Tune automotive repair shops in the San Diego area, a gas station in Escondido, and part of the land on which the gas station operated. Shah told his business partner, Guillermo Zavala, that he wanted to sell his shop located in Lemon Grove, Econo Lube 'N Tune # 51 (the Shop). Zavala told Montoya, his best friend, about the opportunity. In September 2004, Shah and Montoya entered into an oral agreement for Montoya to pay Shah \$60,000 in exchange for a 50 percent ownership interest in the Shop. The following month, Shah and Montoya set up a corporation, R and K Financial Inc. (R&K), and opened a bank account for operating expenses. Montoya and Shah each deposited \$7,500 into the account.

At this time, unbeknownst to Montoya, Shah was under investigation by the State Bureau of Automotive Repair (BAR) and not eligible to operate the business. Montoya learned about the investigation when he received a letter from the BAR seeking more information before it could transfer the Shop's BAR license to R&K. Without any input from Montoya, Shah responded to the letter, stating that Montoya

had purchased the Shop and held its full ownership interest. Although Montoya knew some of the responses were incorrect, he signed the letter and mailed it because he did not know what else to do.

In May 2005, Montoya started to have financial difficulties running the Shop. At about the same time, Shah resolved the BAR matter and became eligible to operate the business. Montoya told Shah that he would need to close the business because he could not pay rent, but Shah did nothing. On June 9, Montoya received a three-day notice to quit or pay rent. He closed the business the following day. Within a few days, Shah reopened the Shop and paid the rent due. Shah then tried to sell the entire Shop to one of his employees.

In July 2005, Montoya met with Zavala and Shah. He asked Shah for his money back, but Shah refused and claimed that Montoya owed him money. At that time, Zavala and Shah were in the process of selling another store that they co-owned to a third party. Zavala agreed to give Montoya a promissory note for \$60,000 of the sales proceeds because Zavala wanted Montoya to have the money Montoya had paid Shah. The third party involved in the sale executed a promissory note payable to Montoya for \$60,000. Montoya received some payments under the note in the total amount of \$12,936.24, until the payments stopped.

In May 2007, Montoya filed this action alleging causes of action for breach of contract, common counts and fraudulent misrepresentation. The parties tried the matter to the court, which found in Montoya's favor on his claims for breach of contract and fraud. The court awarded Montoya \$60,000 in damages, less

\$12,936.24. It also found by clear and convincing evidence that Shah's conduct involved fraud, malice and oppression that warranted \$20,000 in punitive damages. The court entered judgment in Montoya's favor and Shah timely appealed.

DISCUSSION

I. *Sufficiency of the Evidence*

A. Standard of Review

We review the trial court's express or implied factual findings to determine whether they are supported by substantial evidence. (*Williams v. City of Belvedere* (1999) 72 Cal.App.4th 84, 89-90.) Under this standard we review the entire record to determine whether there is substantial evidence supporting the factual determinations (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874), viewing the evidence and resolving all evidentiary conflicts in favor of the prevailing party and indulging all reasonable inferences to uphold the judgment (*Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1254-1255). The issue is not whether there is evidence in the record to support a different finding, but whether there is some evidence that, if believed, would support the findings of the trier of fact. (*Rupf v. Yan* (2000) 85 Cal.App.4th 411, 429-430, fn. 5.)

Credibility is an issue of fact for the trier of fact to resolve (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622) and the testimony of a single witness, including a party, is sufficient to provide substantial evidence to support a factual finding (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614).

B. Alleged Inaccuracies in the Statement of Decision

Shah asserts that the evidence does not support a number of the court's statements in its written decision, and that some of the court's findings were contradictory. Shah, however, failed to bring any alleged inconsistency to the attention of the trial court. (Code Civ. Proc., § 634.) Accordingly, we will infer that the trial court made implied factual findings favorable to the prevailing party on all issues necessary to support the judgment, including the omitted or ambiguously resolved issues. (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 59-60 (*Fladeboe*).) Additionally, it is a well-established principle that the findings of a trial court should be liberally construed and any inconsistency therein so resolved as to uphold rather than defeat its judgment. (*Woodbine v. Van Horn* (1946) 29 Cal.2d 95, 109; *Ensele v. Jolley* (1922) 188 Cal. 297, 303.)

Moreover, Shah does not explain how the trial court's alleged inaccuracies are material to the court's ultimate determination that he committed fraud and breached a contract with Montoya. (*Kuffel v. Seaside Oil Co.* (1977) 69 Cal.App.3d 555, 565 ["A 'material' issue of fact is one which is relevant and essential to the judgment and closely and directly related to the trial court's determination of the ultimate issues in the case"].) Thus, we will not discuss the alleged inaccuracies. Rather, we note that Shah cites evidence the court may have relied on to make the statements he now challenges, but attacks the credibility of that evidence or cites contradictory evidence. Shah essentially asks us to

reevaluate the credibility of the witnesses, the weight of the evidence and the inferences the trial court drew from the evidence. This we cannot do.

C. Accord and Satisfaction

As an affirmative defense, Shah claimed that Montoya's acceptance of a promissory note for \$60,000 from the third party purchaser of a business he and Zavala sold amounted to an accord and satisfaction that extinguished any obligation he might have owed Montoya. The trial court rejected this defense, finding that the transfer of the note to Montoya was unrelated to Montoya's agreement with Shah. Shah asserts the trial court erred because the evidence does not support its conclusion. We disagree.

"An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled." (Civ. Code, § 1521.) "Acceptance, by the creditor, of the consideration of an accord extinguishes the obligation, and is called satisfaction." (Civ. Code, § 1523.) A party asserting that an accord and satisfaction occurred "must establish '(1) that there was a "bona fide dispute" between the parties, (2) that the debtor made it clear that acceptance of what he tendered was subject to the condition that it was to be in full satisfaction of the creditor's unliquidated claim, and (3) that the creditor clearly understood when accepting what was tendered that the debtor intended such remittance to constitute payment in full of the particular claim in issue.' [Citation.]" (*BII Finance Co. v. U-States Forwarding Services Corp.* (2002) 95 Cal.App.4th 111, 126-127.)

The question whether a binding accord has been formed is determined by application of the ordinary principles of contract law, including those related to mutual consent. (*Zuckerman v. Pacific Savings Bank* (1986) 187 Cal.App.3d 1394, 1405.) Mutual consent is determined by an objective standard, and is dependent on the outward manifestations of the parties and not their unexpressed, subjective intent. (*T.M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 282.) Whether an accord and satisfaction has been reached is a question of fact that "depends on the intention of the parties as determined from the surrounding circumstances, including the conduct and statements of the parties, and notations on the instrument itself. [Citation.]" (*In re Marriage of Thompson* (1996) 41 Cal.App.4th 1049, 1058-1059.)

Here, the trial court heard testimony from Shah, Montoya and Zavala about the promissory note that Montoya received. Shah testified that he agreed to give Montoya the note to resolve the matter with Montoya, and that he mistakenly failed to put his name on the promissory note. Montoya testified that Shah did not make him any kind of offer, and that the note had nothing to do with Shah. He described the note as a gift from Zavala, and claimed that he still wanted his money back from Shah. Zavala similarly testified that Shah had no involvement in the note.

After seeing and hearing these witnesses, the trial court resolved the conflicting evidence in accordance with its role as the trier of fact. In doing so, the court necessarily assessed the weight, credibility and value of all the evidence before it found in Montoya's favor on the factual issue of whether the parties had reached an

accord and satisfaction. Shah's appellate challenge is an invitation for us to reweigh the evidence and draw different conclusions from it. This is not our task.

D. Breach of Contract

1. Montoya's Allegations and the Trial Court's Findings

Montoya alleged that he entered into an agreement with Shah to purchase a 50 percent ownership interest in the Shop, with Shah to remain a "silent partner." Montoya claimed that Shah breached the agreement by refusing to help pay the rent and reopening the Shop without Montoya's knowledge. He also alleged that Shah never transferred any ownership interest in the Shop.

In its statement of decision, the trial court concluded that the parties entered into an agreement to become equal partners, with Montoya paying Shah \$60,000 for a 50 percent ownership interest in the Shop. The court concluded that the parties were to share equally in the business income and expenses, with Montoya operating the Shop, and Shah a "silent partner." The trial court found that the breach occurred "on or about June 10, 2005," but did not specify how Shah breached the agreement.

2. Analysis

Shah does not challenge the sufficiency of the evidence supporting the trial court's express or implied findings that an agreement existed, that Shah breached the agreement and caused Montoya's damages. Rather, Shah claims that because the court's decision follows a "partnership theory," the California Uniform Partnership Act of 1994 (the Act, Corp. Code, § 16100 et seq.) applies. Shah

maintains that under the Act, Montoya was a "disassociating partner" because the partnership had notice of Montoya's will to withdraw from the partnership when he closed the Shop. (Corp. Code, § 16101.) Because the Act applies, Shah asserts that Montoya's claim is time-barred.

Shah raised the Act for the first time during closing argument, and again in his motion for new trial. The trial court, however, did not address the issue in its statement of decision, and denied the new trial motion expressly finding "no error of law." Thus, the trial court impliedly concluded that Montoya was not a disassociating partner under the Act. Substantial evidence supports this implied finding.

The trial court expressly found that Shah breached the agreement "on or about June 10, 2005." During this time period, Shah refused Montoya's request to assist in paying the rent. Thus, to the extent the Act applied, the trial court impliedly found Shah wrongfully disassociated from the partnership by breaching that provision of the partnership agreement requiring him to share in the business expenses. (Corp. Code, § 16602, subd. (b)(1).) This breach made Shah liable to Montoya for damages caused by the dissociation. (Corp. Code, § 16602, subd. (c).) Because Montoya was not the dissociating partner, the limitations period of the Corporations Code did not apply. (Corp. Code, § 16701, subd. (i).)

E. Fraud

1. Montoya's Allegations and the Trial Court's Findings

Montoya's complaint contains a cause of action for fraudulent misrepresentation. Although Montoya separated the misrepresentations into five

paragraphs, the gist of this claim involves three alleged misrepresentations by Shah: (1) he never intended to abide by the agreement; (2) he misrepresented his standing with the BAR; and (3) he never intended to give Montoya a 50 percent ownership in the business.

The trial court found Shah liable for fraud, but the statement of decision did not specifically address the fraud cause of action. Nonetheless, a number of the court's express findings relate to this claim. Namely, the court found that the parties entered into an agreement whereby Montoya would obtain a 50 percent ownership interest in the business in exchange for \$60,000. Montoya obtained the investment money by placing a second mortgage on his house. Shah failed to disclose to Montoya that he was under investigation by the BAR, arranged to place the business in Montoya's name to avoid further scrutiny from the BAR, and falsely informed the BAR that he had no interest in the Shop. Shah successfully resolved the BAR matter and became eligible to operate the business. When the Shop experienced cash flow difficulties, Shah refused to meet with Montoya or provide any assistance with the business. After Montoya closed the Shop, Shah paid the landlord, reopened the business, and began operating the Shop as if it were his sole property. Shah then offered to sell the Shop to a third party without notice to Montoya.

2. Analysis

Shah claims the judgment on the fraud cause of action must be reversed because: (1) the statement of decision does not specify the fraudulent activity; (2)

the decision correctly found the existence of a partnership, so a valid ownership interest had to have been transferred to Montoya, and Montoya remains a 50 percent owner; and (3) Montoya did not rely on any representation by Shah; rather, he relied on Zavala. We reject his contentions.

As a threshold matter, although Shah correctly asserts that the statement of decision does not set forth findings on the nature of the fraudulent activity, he waived any claim of error by not bringing this matter to the attention of the trial court. (*Fladeboe, supra*, 150 Cal.App.4th at pp. 59-60.) Accordingly, we liberally construe the trial court's findings (*Woodbine v. Van Horn, supra*, 29 Cal.2d at p. 109) and resolve all evidentiary conflicts to uphold the judgment (*Jordan v. City of Santa Barbara, supra*, 46 Cal.App.4th at pp. 1254-1255).

To establish a claim for fraud, Montoya needed to prove: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*)). An action for fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract. (*Ibid.*) "A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. [Citations.]" (*Ibid.*) Proof of nonperformance of the promise is, without more, insufficient to prove the defendant had no intent to perform the promise at the time it was made. (*Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18,

30.) However, fraudulent intent is most often shown by circumstantial evidence, and may be "inferred from such circumstances as defendant's . . . hasty repudiation of the promise, his failure even to attempt performance, or his continued assurances after it was clear he would not perform." (*Ibid.*)

Although Shah challenges only the element of reliance, we briefly review the evidence supporting the court's implied findings on all elements of the fraud claim. First, we reject Shah's assertion that the court's finding of the existence of a partnership necessarily implied it also found he had transferred a valid ownership interest in the Shop to Montoya. As our high court found in *Lazar*, where a plaintiff has been fraudulently induced to enter into a contract, the defendant may be liable for both breach of contract and fraud. (*Lazar, supra*, 12 Cal.4th at p. 638.) Accordingly, the trial court's finding that the parties entered into a valid contract to *create* a partnership does not necessarily imply a finding that Shah transferred a valid ownership interest in the Shop to Montoya.

Based on the evidence presented, the trial court could reasonably conclude that Shah never intended to abide by the agreement. Shah promised to give Montoya a 50 percent ownership interest in the Shop. The parties also placed an equal amount of money into a bank account, suggesting they intended to equally share the business expenses. Montoya relied on Shah's promise by quitting his job and placing an equity line of credit on his home to obtain the \$60,000 payment.

Montoya testified, however, that Shah did not give him an ownership interest in the Shop, or assist in paying the business expenses. Although Shah

testified that Montoya had possession of the Shop, the lease remained in Shah's name and he had no evidence showing that Econo Lube 'N Tune transferred any ownership of the franchise to Montoya. Shah's attempt to sell the entire business to a third party without informing Montoya similarly supports a conclusion that Montoya had acquired no ownership interest in the Shop.

The court could reasonably infer that Shah entered into the agreement with the secret intent not to abide by it. The court's express findings that Shah failed to disclose the BAR investigation to Montoya, arranged to place the business in Montoya's name to avoid further scrutiny from the BAR, and falsely informed the BAR that he had no interest in the Shop, supports this conclusion. Montoya's testimony that Shah continued to control "everything" after they made the agreement further supports this conclusion. As a result of Shah's failure to abide by the agreement, the court reasonably concluded that Montoya lost \$60,000, the amount he gave Shah.

F. Alleged Excessive Damages

The trial court found that Montoya suffered damages as a result of the breach of contract and fraud in the amount of \$60,000, less \$12,936.24 received by Montoya on the note. Shah asserts the damages are excessive. He also complains that the trial court failed to explain how it calculated the damages, contending that the court needed expert testimony regarding the value of the Shop when purchased and at the time of sale. We reject Shah's assertions and find substantial evidence supports the damages award.

In fraud cases involving the "purchase, sale or exchange of property," the Legislature has expressly provided that the "out-of-pocket" measure of damages should apply. (Civ. Code, § 3343, subds. (a), (b)(1).) Damages for breach of contract are similarly measured as the amount that will compensate the plaintiff for the detriment caused by the breach. (Civ. Code, § 3300.)

Based on its implied conclusion that Montoya did not receive the promised ownership interest in the Shop, the trial court correctly determined that Montoya suffered damages in the amount he had paid Shah, \$60,000. Although the court concluded that the promissory note Montoya obtained from Zavala was unrelated to Shah, it subtracted the payments that Montoya had received under the note. This decision benefited Shah and Montoya did not challenge it.

Our review of the payment history under the note reveals how the trial court calculated this offset. The court added together the payments to Montoya, but subtracted two payments marked "no copy." The result of this calculation is \$12,936.24, the precise amount the court deducted as an offset. Although Shah asserts the court failed to take into account his claims that Montoya had depleted the inventory of the Shop and converted equipment, Shah did not bring this omission in the statement of decision to the trial court's attention. Under the doctrine of implied findings, we assume the court rejected these claims.

(*Fladeboe, supra*, 150 Cal.App.4th at pp. 59-60.)

G. Punitive Damages

Shah asserts that the \$20,000 punitive damage award should be reversed because Montoya failed to present any evidence of Shah's financial status. We agree.

"An award of punitive damages hinges on three factors: the reprehensibility of the defendant's conduct; the reasonableness of the relationship between the award and the plaintiff's harm; and, in view of the defendant's financial condition, the amount necessary to punish him or her and discourage future wrongful conduct. [Citations.]" (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 914.) We review the trial court's award of punitive damages for substantial evidence. (*Id.* at p. 916.) The plaintiff bears the burden of presented "meaningful evidence of the defendant's financial condition." (*Adams v. Murakami* (1991) 54 Cal.3d 105, 109, 119.) "Without such evidence, a reviewing court can only speculate as to whether the award is appropriate or excessive." (*Id.* at p. 112.)

Here, there was no evidence of Shah's financial condition. Although Montoya presented evidence that Shah owned other Econo Lube 'N Tune automotive repair shops in the San Diego area, a gas station in Escondido, and part of the land on which the gas station operated, he presented no evidence of the value of these assets, what income Shah derived from them, or their liabilities. (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 680 ["evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income"].)

Accordingly, that part of the judgment awarding punitive damages is reversed. Because Montoya had a full and fair opportunity to present his case for punitive damages, no retrial of the issue is required. (*Baxter v. Peterson, supra*, 150 Cal.App.4th at p. 681.)

DISPOSITION

The punitive damages award is reversed. In all other aspects, the judgment is affirmed. Respondent is entitled to his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (a)(3).)

McINTYRE, J.

WE CONCUR:

NARES, Acting P. J.

AARON, J.